79-26

Supreme Court, U. S.
FILED
JUL 5 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

TERM 1979

No. . . . . .

DOLPHUS MICKEY WALKER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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The Petitioner, DOLPHUS MICKEY WALKER, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceedings on January 29, 1979.

Opinion Below.

The memorandum opinion of the United States Court of Appeals for the Ninth Circuit, is unpublished, and appears in the Appendix hereto. (Appendix "A").

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254, or in the Alternative 28 U.S.C. Section 1651.

Questions Presented

1. Whether the decision of the Court of Appeals for the Ninth Circuit, holding that the Grand Jury proceedings did not violate the Defendant's equal protection and due process rights, is in direct conflict with the Supreme Court of California, in the Hawkins (v) Superior Court of the City of San Francisco (22 cal. 3d 584, 586, P. 2d. 916)

2. Whether the decision of the Court of Appeals for the Ninth Circuit as to the Grand Jury proceedings being proper, in light of the obvious departure from judicial and constitutional safeguards in a criminal proceeding, is in direct conflict with those fundamental rights guaranteed under the Constitution.

3. Whether the Court of Appeals denial to grant Appellant's Petition for re-hearing due to late filing of two days, (when holidays are included in that period), presents an oppressive application of the procedural rules thereby depriving said Petitioner of his fundamental rights of Due Process for something less than a compelling Government interest in setting filing dates.

4. Whether the Appellate Court's affirmance of the District Court's findings, that all property purchased by the Defendant was collateral pledged to

the Small Business Administration, constitutes a taking of property without Due Process and thereby reversible error when the funds used are from an independent third party.

Constitutional and Statutory Provisions Involved

United States Constitution, Amendment V:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law. . ."

United States Code Title 15 Section 645 (c)

> "Whoever with the intent to defraud knowingly conceals, removes, disposes of, or converts to his own use . . . property mortgaged, or pledged to or held by, the administration, shall be fined not more than $5,000, or imprisioned not more than five years. . ."

Statement of the Case

On September 28, 1973, DOLPHUS MICKEY WALKER, signed an application for a Small Business Administration (SBA) guarantee loan in the amount of $250,000 (Exhibit 1A). The application was signed D. MICKEY WALKER and typed above was D. MICKEY WALKER and MARY L. WALKER, dba, Azusa-Covina Rents, West Covina Rents and A-BEE Rents. The application disclosed the Appellant's type of business as a consumer equipment rental (retail). (Exhibit 1A, pg. 1, Section 1, ln. 4).

The Appellant initially made application for the loan through Government Guarantee Securities Corporation, of Los Angeles, California, which was a non-bank authorized lender of the SBA guarantee loans (Exhibit 1B). Government Guarantee Securities Corporation submitted the loan request to the SBA office in Los Angeles on September 29, 1973, for guaranteed participation. The documents of submission included the description of the business activities (Exhibit 1B, Pg. 3, of the Participating Lenders Opinion).

That description discloses that:

"At the present, the business is 90% rental of equipment and 10% sales of equipment".

This statement is followed by a breakdown of the equipment and sales volume, thereby disclosing to the SBA the nature of Appellant's business operation.

Further information, which made the SBA aware of the rental and retail aspects of the Appellant's business is found in the Dunn and Bradstreet Business Information Report. It states that "the operation of the business is 80% rental and 20% retail" (Exhibit 1F, Pg. 3).

On November 1, 1973, Appellant, by letter, authorized the Government Guarantee Securities Corporation to request the loan amount be increased by $127,000, for a total of $377,000 so that the Appellant could pursue the purchase of the real property at the Azusa-Covina Rents location (Exhibit

1C). On that same day, November 1, 1973, Government Guarantee Securities Corporation forwarded the request to the SBA for approval. (Exhibit 1D).

In connection with the loan request, financial statements were submitted for the years of 1970, 1971, 1972 and August 31, 1973. (Exhibit 1E).

On November 5, 1975, the SBA issued to Government Guarantee Securities Corporation an authorization approving the Lender's request for the SBA guarantee. The guarantee was for 90% of the loan in the amount of $377,000 to be made to D. MICKEY WALKER and MARY L. WALKER, dba, Azusa-Covina Rents, West Covina Rents, A-BEE Rents (Exhibit 1I). On November 19, 1973, Appellant sent a letter to the SBA requesting that the loan authorization to be transferred from Government Guarantee Securities Corporation to the San Gabriel Valley Bank (S.G.V.B.) El Monte, California. Both the Government Guarantee Securities Corporation and the San Gabriel Valley Bank had previously, on November 16, 1973, requested the aforementioned transfer (Exhibit 1J). On November 29, 1973, Appellant signed the SBA Loan Agreement, the SBA Security Agreement, the SBA Note and the SBA Guarantee Agreement (Exhibit 1L, 1M, 1N, and 1O). The above loan papers stated that the collateral of the loan consisted of "the location of the debtors chief place of business, 18554 East Arrow Highway, Covina, California 91722, together with all equipment and

furniture of the debtor, presently owned, acquired contemporaneously or pursuant to this security agreement and acquired at any time subsequent to this security agreement by debtor plus all additions, replacements and assessions, thereof, and proceeds therefrom." The loan agreement, (Exhibit 1K, Pg. 2, Section 10), Other Provisions, a) Borrower shall provide and maintain hazard insurance in maximum available coverage and amounts. b) Borrower shall not sell, lease, hypothecate or otherwise dispose of any of its fixed assets without prior written consent of the lender or SBA. The security agreement (Exhibit 1L, Pg. 1, Paragraph 3, Section B1, Protection of Collateral) states that the collateral: "a.) will be used primarily in the debtors business unless the secured party consents in writing to another use, b.) will be kept in proper repair, c.) will be insured against all risks, d.) will be kept at the debtors chief place of business where secured party may inspect it a anytime, except for the temporary removal in connection with its ordinary use or unless debtor notifies secured party in writing and secured party consents in writing in advance of its removal to another location."

On or about December 10, 1973, the loan proceeds were distributed in accordance with the loan agreement (Reporter's Transcript, Pg. 500).

Following the completion of the SBA guaranteed loan which was serviced by the San Gabriel Valley National Bank, the Appellant, DOLPHUS MICKEY

WALKER, continued to meet with Mr. Abtin, the bank representative, to discuss the lack of success of the Whittier location. Several alternatives were discussed including sale or lease of the Appellant's business interest in that location (Reporter's Transcript, Pg. 374 through 379. Reporter's Transcript Pg. 734).

On or about February of 1974, the Appellant leased to Sid and Marge Dix, with an option to purchase, his business interest in A-BEE Rents, 13345 Imperial Highway, Whittier, California (Exhibit 2E, 2F and 2G). The Appellant's business interest consisted of a rental agreement for the land, equipment used in the business and goodwill.

The sublease on the property and the lease agreement on the equipment were for a term of five years and contained a covenant not to compete in the area for that same period (Exhibit 2A). It also included a transfer of the leasehold improvements and an option to purchase all of the Appellant's

> "rights, title and interest in the leased equipment, as is, where is, without course to or warranty by us for a price of $8,040.00." (Exhibit 2B and 2G).

The name A-BEE Rents was changed to A-Rental Headquarters due to a stipulation for entry of judgment prepared by the attorneys for Abbey Rents (Exhibit D1). Shortly after the agreement, Mr. Dix defaulted on his obligation under the lease. Appellant, with written permission from Mr. Dix, entered upon the property and recovered the lease equipment.

(Grand Jury Transcript dated April 21, 1977, Pg. 41, lines 12 through 20). (A copy of the letter of authorization by Mr. Dix is attached as an Exhibit to the Appellant's brief on the motion to dismiss the indictment dated April 27, 1977). After recovery, the equipment was brought to Azusa-Covina Rents and used in conjunction with the Appellant's business.

On or about July 15, 1974, Appellant leased to Melvin and Rosemary Bodarke, with an option to purchase, his business interest in A-Rental Headquarters.

The agreement contained a sublease for the land and buildings, a lease for the equipment used in the business, a covenant not to compete, a transfer to Mr. Bodarke of the leasehold improvements and an option to purchase all rights, title and interest in the leased equipment at the end of the lease (Exhibits 4B, 4C, 4D, and 4E).

The transaction is substantially the same as the one with Mr. Dix, with one exception. That exception being, the term of Mr. Bodarke's lease is ten years, where Mr. Dix's lease was for five years.

Shortly after Mr. Bodarke took over the business, he defaulted on the lease, litigation insued and a receiver was appointed for the business.

On or about October, 1974, Appellant entered into a transaction with Mr. Roe to lease a certain portion of the Azusa-Covina Rents and the operation of that portion of the business (Exhibit 6E). The transaction

involved the advancement of funds for the purpose of acquiring the equipment which would be sold as part of the rental business. The lease, (Exhibit 6E) was signed: Lessee, Amco Rents by Tom Roe and Lessor, M&M Leasing by D. Mickey Walker. By October of 1974, Appellant established dba as M&M Walker Leasing and Victor Financial Limited Corporation. All documents were duly filed to establish and validate the (dba)s mentioned above. Certain portions of the property were excluded from the lease which Appellant would continue to operate. A corporation that Mr. Roe had, was made available (D.W. Securities). It was contemplated that the transactions between Mr. Roe and the Appellant would include Azusa-Covina Rents as described above and the operation of a restaurant which was acquired at a later date with funds from an investor known to Mr. Roe. (Recorder's Transcript, Pg. 399, 403). The investor backed out. However, by that time Appellant had assigned the lease and the equipment purchased for resale to a Mr. Lowell O'Connor (Exhibit 6C). The Appellant contacted a Mr. Steinman, who agreed to acquire Victor Financial and provide the funds necessary to get clear title to the property which was the subject of the lease assigned to Mr. O'Connor. (Exhibit 6E and 6F). Appellant had, at that point, committed to a transaction with Mr. O'Connor for the purchase of a boat titled, "Tenderly". The assignment of the lease was part of that transaction. The documentation

relative to the O'Connor transaction included the purchase agreement for the boat, (Exhibit 6A), the bill of sale, (Exhibit 6B), the lease assignment, (Exhibit 6C), the lease agreement of equipment value, (Exhibit 6D), the Amco-Walker lease, (Exhibit 6E and 6F), the purchase option at the end of the lease, (Exhibit 6G), and the bill of sale for the equipment on the lease, (Exhibit 6H).

At this point, Mr. Steinman supplied the funds to clear the title to the equipment under the assigned lease and bill of sale. (supra). The funds were used to clear title to the equipment which was sold to Mr. O'Connor and leased out for the benefit of the Appellant who was only obligated to make lease payment for the use of the equipment. For the sale of the equipment and lease Victor Financial acquired the boat, "Tenderly". At the agreement of Mr. Steinman, the boat was used as a charter for the business. This venture was not profitable. The boat was sold to a Mr. Simon for $65,000. (Exhibit 14). The funds used in acquiring the boat were from Mr. Steinman as a part of, and held by, Victor Financial Limited. The transfer to Mr. Simon was clear of the SBA agreement due to the nature of the funds. The proceeds of the sale were deposited with the Appellant's attorney and subsequently used to pay off creditors of the business. (Reporter's Transcript, Pg. 398).

Certain stock and equipment was not in demand and placed in storage. This equipment consisted of

large tables, chairs, glasses, tablecloths, rug cleaners, ropes, hoses and numerous small items. (Reporter's Transcript, Pg. 478).

On or about June of 1975, Mr. Steinman formed Investors Financial Corporation for the purpose of owning and operating some hotels in Charlotte, North Carolina. Mr. Steinman contacted Appellant and offered him an interest in the business in return for managing the hotel operation. (Reporter's Transcript, Pg. 444, 445, 446.) The Appellant accepted the offer and set the California business operation up to be managed by Appellant's wife and stepson, as it was when the Appellant first met Mary L. Walker. (Exhibit 1F, Pg. 3).

Appellant went to North Carolina and, upon seeing the hotel operation, it was obvious more equipment was necessary for the banquet facility as well as maintenance of the hotel. (Reporter's Transcript, Pg. 540-568). Arrangements were then made to lease banquet and other equipment needed from the Appellant's rental business in California. (Exhibit K1).

Three truck loads of equipment were taken to North Carolina. Each truck load was insured against loss or damage. Each truck was rented by or at the Appellant's authority and no attempt was made to disguise who was the lessee on the vehicles. Susequently, several payments were made pursuant to the lease (Exhibit K1) with the hotels in North Carolina. (Reporter's Transcript, Pg. 458). About that

time a full investigation was under way by the SBA due to the delinquent state of the loan. The investigation resulted in DOLPHUS MICKEY WALKER being brought before the Grand Jury.

By Indictment filed on February 22, 1977, in the United States District Court, Central District of California, Appellant was charged with ten separate violations of Title 15, United States Code, Section 645(c) (supra).

Appellant was given the right to appear and be heard before the Grand Jury on December 21, 1976. On or about February 22, 1977, the Grand Jury purported to return an Indictment against the Appellant, who, thereafter, appeared before the Court to answer the set charges.

On or about February 18, 1977, four days prior to the aforementioned act of the Grand Jury, the Honorable Albert Lee Stephens, Jr. signed an order discharging the Grand Jury. The Grand Jury was thus not in legal session at the time of the hearing.

Subsequent to February 22, 1977, four days after signing the order of discharge of the Grand Jury, the Honorable Albert Lee Stephens, Jr. signed an order purporting to set aside the discharge of the Grand Jury. The order setting aside the discharge was signed after the first Grand Jury Indictment was returned.

On or about April 19, 1977, Appellant, by and through his attorney, appeared before the Court and objected to the jurisdiction of the Court on the

grounds that the Indictment had not been validly returned. The Court, at that time, ordered the matter resubmitted to the Grand Jury.

The next morning, April 20, 1977, at 9:30 A.M., the Appellant appeared to testify before the Grand Jury. At approximately 12:50 P.M. of the same day, the Appellant was given the right to appear before the Grand Jury to make his presentation. After five minutes of presentation Appellant was interrupted by the Assistant United States Attorney and told that the Assistant United States Attorney:

> "Was going to allow him to testify for another five or ten minutes". (Grand Jury Transcript, Pg. 9, Lines 22 and 23).

Appellant was allowed ten minutes to make his presentation at which time he was asked to leave the room so the Assistant United States Attorney could ask the Grand Jury, "if they would like to hear anymore testimony." (Grand Jury Transcript, Pg. 14, Lines 2 through 5).

After Appellant left the room the Assistant United States Attorney told the Grand Jurors that:

> "Much of Mr. Walker's testimony so far was irrelevant." (Affidavit of Kathryne Stoltz, Assistant United States Attorney in the Central District of California, dated April 29, 1977).

In the affidavit of DOLPHUS MICKEY WALKER, dated April 27, 1977, the Appellant avows he overheard the Assistant United States Attorney state to the

Grand Jury:

> "The information he was transmitting to them was only civil in nature and was not important for their consideration".

Further statements by the Assistant United States Attorney were to the general affect that "this matter has already been considered by another Grand Jury, and it was being brought before them to cure some technicality". All other testimony in the April 21, 1977, Grand Jury hearing was read to the jurors from the transcripts of the prior proceedings before the Grand Jury which was discharged days prior to their indictment. No other witnesses were called, with the exception of, perhaps, one FBI Agent. The second Grand Jury Indictment was based completely on the use of transcripts from an illegal Grand Jury hearing, due to their early dismissal.

On April 21, 1977, the Grand Jury returned a Superseding Indictment identical to the original Indictment. On April 22, 1977, the Appellant, with his attorney, appeared before the United States District Court, Central District of California, on the Superseding Indictment and entered a plea of "Not Guilty".

On May 2, 1977, Appellant, by and through his attorney, moved the Court to dismiss the Indictment on numerous grounds including the excessive and abusive use of hearsay in obtaining the Superseding Indictment and that the Appellant was denied his right

to equal protection and Due Process under the law through the use of transcripts from the dismissed, thereby, illegal Grand Jury proceedings. The motion to dismiss was denied on May 22, 1977.

On July 13, 1977, Appellant, by and through his attorney, filed a Petition for Writ of Prohibition on the grounds that:

> "The Appellant-Petitioner was denied due process of law arising from the completely hearsay nature of the testimony presented to the Grand Jury on April 20 and 21, 1977, and the Appellant-Petitioner was denied equal protection and due process of the law arising from the restrictions placed on the Appellant-Petitioner at the time he was testifying before the Grand Jury".

The Petitioner requested the Indictment be set aside or, in the alternative, that an order be issued requiring cause to be shown why said Indictment should not be set aside and dismissed. The Petition for Writ of Prohibition was denied.

On July 19, 1977, the trial commenced in the United States District Court, Central District of California, Honorable William Matthew Bryne, Jr., Judge Presiding. The Government rested on July 21, 1977, at which time the Appellant made a motion for judgment of acquittal on the grounds that the evidence which was presented was insufficient to sustain the burden of proof which is required by the prosecution in each and every count. The motion was denied.

(Recorder's Transcript, Pg. 338 through 350). At the conclusion of the trial, the Court's ruling on the Indictment found the Appellant guilty of four out of the ten counts charged in the Indictment.

On January 29, 1979, the Ninth Circuit Court of Appeals affirmed the judgment of the District Court on all four counts.

On February 14, 1979, Appellant, by and through his attorney, filed a petition for rehearing. The petition was denied due to filing two days late.

On March 1, 1979, the Appellant, by and through his attorney, filed a Motion To Permit Late Filing For Petition of Rehearing with the Ninth Circuit Court of Appeals. The motion was denied on April 5, 1979.

REASONS FOR GRANTING THE WRIT

I

The Appellate Court erred in concluding that the Grand Jury proceedings did not violate Appellant-Defendant's Equal Protection and Due Process Rights, thereby, being in direct conflict with the California Supreme Court, in Hawkins (v) Superior Court of the City of San Francisco (22 Cal. 3d. 584, 586 P. 2d. 916).

The Petitioner was permitted to testify before the first Grand Jury. That Grand Jury was dismissed prior to their handing down an indictment. That indictment upon challenge by the Petitioner was found insufficient.

A second Grand Jury hearing was ordered. The Petitioner was again allowed to testify, but this testimony was wholely restricted. (Details of the restrictive action can be found in the Statement of the Case, (supra). The indictment was issued, Petitioner was arraigned and stood trial. The Appellate Court affirmed that this action did not violate Petitioner's Due Process and Equal Protection Rights. Yet, the Supreme Court of California, in Hawkins (v) Superior Court of the City of San Francisco (supra) held that "the accused is denied equal protection of laws guaranteed by the California Constitution when prosecution is by indictment and he is deprived of a preliminary hearing and concomitant rights which attach when prosecution is by information, and appropriate remedy would be to allow such Defendants

to demand post-indictment preliminary hearings prior to or at the time of entering a plea."

The Petitioner continuously demanded his right to be heard, by motions after the first improper indictment, the second indictment, at the arraignment, and in pre-trial motions against the Superseding Indictment. Each time affirming that his constitutional rights of Due Process and Equal Protection were being denied.

An accused by information is afforded an impressive array of procedural rights, including pre-trial hearing before a neutral and legally knowledgeable magistrate, right to counsel, right to confront and cross-examination of witnesses, and an opportunity to personally appear and present exculpatory evidence.

When indicted by a Grand Jury proceedings, all rights afforded by the constitutional safeguards stated above, are lost.

Supreme Court Justice Mosk, stated in the Hawkins decision (supra) "under the traditional two-tier test of equal protection, discriminatory legislative classification that impairs fundamental rights will be subjected to strict scrutiny by the Courts, and the State will be required to bear the heavy burden of proving not only that it has a compelling interest which justifies the classification, but also that the discrimination is necessary to promote that interest." (See Serrano (v) Priest (1976) 18 cal. 3d 728, 761, 557 P.

2d 929 and cases cited.)

Here the Appellate Court affirmed the procedural steps taken in the indictment proceedings, arraignment, and pre-trial. They over-ruled the Petitioner's appeal to protect his constitutional rights at all critical stages of criminal proceedings; and that the indictment and Grand Jury proceedings violated those rights.

Mere procedural advantage afforded the United States Attorney by indictment does not support the burden of proof necessary under the strict scrutiny test stated (supra).

The Fifth Amendment of the Constitution provides "No Person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . nor be deprived of life, liberty, or property, without due process of law; . . . ."

"The Constitution authorizes the use of Grand Juries to indict criminal defendants, but it leaves to the legislature and the Courts the task of developing procedures, consistent with all other fundamental rights under the Constitution.

"In criminal actions, where life or liberty is at stake, courts should not adhere to precedents unjust to the accused. It is never too late to mend" (People (v) Aranda (1965) 63 cal. 2d 518, 539 [407 P. 2d 265], Quoting from United States v. Delli Paoli, 229F. 2d 319, 323 (dis. opn. Frank, J. I.)

In U.S. vs. Gardner, (516 F 2d 334, 339), it is stated that a prospective defendant does not have a right to appear before the Grand Jury. The Appellant in this case was allowed to appear before the Grand Jury and once given the right there is no law written that he has waived the other rights guaranteed under the Constitution. Why should this administrative body of the Government, the Grand Jury, be set above the principles of equal protection and due process to all who come before it?

The Appellate Court, here, has decided an important state question on procedural due process and equal protection in conflict with the State Supreme Court ruling in Hawkins (supra).

The Petitioner's motions and demands for a fair hearing were denied, and such denial was affirmed by the Appellate Court. Petitioner respectfully submits on the basis of the above, that the judgment must be reversed.

II

The Grand Jury's refusal to receive evidence and the Court's refusal to afford Petitioner's right to fair hearing, as affirmed by the Appellate Court, was a reversible error and a denial of judicial and Constitutional safeguards in a criminal proceeding in direct conflict with the Petitioner's fundamental rights guaranteed under the Constitution.

The statement of facts concerning the Grand Jury proceeding and subsequent motions and rulings of the Court are found in the Statement of the Case (supra) and incorporated herein by reference.

There is an undeniable disparity in procedural rights afforded a defendant charged by the prosecutor by means of an information and defendants charged by a Grand Jury indictment.

A Defendant charged by information is immediately entitled to the rights of: preliminary fair hearing before a legally knowledgeable magistrate who is impartial, representation by counsel at all critical stages of the proceedings, right of confrontation and cross-examination of hostile witnesses and an opportunity to personally appear and affirmatively present exculpatory evidence. (Johnson v. Superior Court (1975) 15, cal. 3d 248, 256, 539 P. 2d 792, 799).

In contrast, the indictment procedure omits all the above safeguards.

All points relative to fair hearing stated in Reason I (supra) are relevant here and incorporated herein by reference.

The most evident depravasion of rights is the one of fair hearing before and impartial, legally knowledgeagle magistrate.

As stated by Justice Mosk:

"The Attorney General recognizes, as he must, that vastly different procedures attend these different modes of prosecution, but maintains that such differences are "more apparent than real." This startling claim is premised on the availability to the accused of judicial review of the Grand Jury's probable cause determination. This assumes that the likelihood of a probable cause finding is the same whether the screening function is performed by the Grand Jury with subsequent judicial review, or by a magistrate at a preliminary hearing. This assumption reflects the idealistic concept that the Grand Jury is an independent body of citizens, standing as a buffer between the state and the individual and protecting the innocent from unfounded accusations of crime. Unfortunately, Grand Jury proceedings today are structured in a manner that renders fulfillment of that ideal unattainable." (Hawkins (v) Superior Court of the City of San Francisco, cited supra.)

The prosecuting attorney is typically in complete control of the total process in the Grand Jury room: he calls the witnesses, interprets the evidence, states and applies the law, and advises the Grand Jury on

whether a crime has been committed. (See Judicial Counsel of California, Annual Rep. (1974) P. 58; Kranitz, The Grand Jury: .Past-Present-No Future (1959) 24 Mo.L.Rev. 318, 328.)

In one role, "Basically the Grand Jury is a law enforcement agency" (United States (v) Cleary (2d cir. 1959) 265, F 2d 459, 461, and cases cited), participating in the prosecutorial task of discovering criminal conduct and the perpetrators thereof; putting on the other hat, the Grand Jury is expected to be a neutral body protecting the individual against prosecutorial abuses. Almost all observers conclude that this conflict of roles has prevented the Grand Jury from being objective, to the detriment of the indicted defendant.

United States District Judge William J. Campbell, former prosecutor, stated (in Campbell, Eliminate the Grand Jury (1973) 64 J. Crim. L. & C. 174.), "Today, the Grand Jury is the total captive of the prosecutor. Who, if he is candid, will concede that he can indict anybody, at any time, for almost anything, before any Grand Jury".

Last, but not least, Justice Douglas put the matter succinctly when he wrote: "It is, indeed, common knowledge that the Grand Jury, having been conceived as a bulwark between the citizen and the Government, is now a tool of the Executive". (United States v. Dionisio (1972), 410 U.S. 1, 23, [35 L. Ed. 2d 67, 82, 93, S. Ct. 764] (dis. opn.)

It was held in the case of Beck vs. Washington, 369 U.S. 541, that it is assumed that a conviction, based upon an Indictment returned by a biased Grand Jury, should be overturned as a violation of due process.

The Assistant United States Attorney at the Grand Jury hearing stated: 1) To the Petitioner that he "was going to allow him (Petitioner) to testify for another five or ten minutes." (supra) 2) To the Grand Jury that, "much of Mr. Walker's testimony so far was irrelevant and that the information he (Petitioner) was transmitting to them was only civil in nature and was not important for their consideration." 3) To the Grand Jury that "this matter had already been considered by another Grand Jury and it was being brought before them to cure some technicality." (supra).

The Petitioner submits that this type of conduct by the Assistant United States Attorney, in light of the comments presented (supra) by Justice Mosk, Judge Campbell, and Justice Douglas, in fact, biased the Grand Jury's decision and violated Petitioner's rights to due process.

The Petitioner further submits that being denied the opportunity to fully address the second Grand Jury and present relevant evidence and testimony to the Grand Jury, deprived him of his constitutional rights of due process and equal protection. In addition, the second Grand Jury indictment was biased and

controlled by the Assistant United States Attorney, thereby, depriving the Petitioner of a fair and impartial hearing by an independent body of citizens, which constitutes reversible error and the Appellate Court's decision must respectfully be reversed.

III

The Appellate Court erred in the denial of Appellant's petition for re-hearing by oppressive application of procedural rules which constitutes a depravasion of the fundamental rights of due process for something less than a compelling government interest in setting filing dates.

On January 29, 1979, the Ninth Circuit Court of Appeals affirmed the judgment of the District Court.

On February 14, 1979, Appellant by and through his attorney, filed a petition for re-hearing. The petition was denied on the grounds it was filed two days late. Court holidays were present during the period in question and the address to which the Court of Appeals mailed the Memorandum of Opinion was not a current address for Appellant's attorney.

On March 1, 1979, the Appellant, by and through his attorney, filed a Motion to Permit Late Filing For Petition of Re-Hearing. This Motion was denied on April 5, 1979.

Under the traditional two-tier test of equal protection, a discriminatory legislative classification that impairs fundamental rights must be subject to strict scrutiny by the Courts, and the State must be required to bear the heavy burden of proving not only that it is a compelling interest which justifies the classification, but also that discrimination is necessary to promote that interest. (See, e.g., Serrano v. Priest (1976) 18 cal. 3d 728, 761, 557 P. 2d 929 and cases

cited).

Here the State did not bear the required burden. Strict scrutiny will hold that there is an absence of the State's compelling interest. The establishment of the discriminatory legislative classification, in this case two days under questionable circumstances, when weighed against the Petitioner's rights to equal protection and due process at every critical stage of the proceedings, does not bear up under the two-tier test.

Where fundamental rights are so violated, to be denied his final appeal because of a mere two day filing infraction, or his own justifiable inattentiveness to the details of dates and methods of filing the Petition, would be to silence the dissenting voice that is crying out for equal protection and due process in all critical stages of a criminal proceeding.

The Petitioner submits where the application of the procedural rules are used to his disadvantage in an oppressive manner, it is a question for this Court to review and respectfully constitutes grounds for reversal on the issue of re-hearing.

IV

The District Court as affirmed by the Appellate Court, erred in their finding that all property purchased by the Petitioner was collateral pledged to the Small Business Administration. This finding constitutes a taking of property without due process of law in violation of the Fifth Amendment of the United States Constitution, where the funds used are those of an independent third party.

The facts of the transaction are contained in the Statement of Case (supra). To paraphrase the facts: Petitioner was engaged in several transactions, one of which was an assignment of lease to a Mr. Lowell O'Connor. This lease included property subject the the SBA collateral agreement. Petitioner contacted one Mr. Steinman, who supplied the funds to clear title to the property subject to the collateral agreement.

The funds cleared title to equipment which was sold to Mr. O'Connor, and then leased out by him for the benefit of Petitioner, who was obligated to make lease payments to O'Connor for the use of the equipment.

In exchange for the sale of the equipment Mr. Steinman and Petitioner received title to a boat called "Tenderly." Title was taken in the name of Victor Financial Corporation, which was used by Petitioner and Mr. Steinman for this transaction. The boat was subsequently sold and the proceeds used to pay creditors of Petitioner.

The District Court, affirmed by the Appellate Court, contend that the property (equipment) that was acquired by the use of funds from Mr. Steinman, was collateral of the Small Business Administration (SBA). They further contend that the subsequent disposal of the property so acquired, was in violation of the SBA agreement and constituted conversion.

The Petitioner testified that the funds used in purchasing the equipment and clearing title, thereto, was from Mr. Steinman. (Reporter's Transcript, Page 447, 454, 610 and 611).

The funds given to Petitioner cleared title to equipment held by the SBA. The equipment being free and clear of the SBA agreement, was exchanged for the boat, "Tenderly." The boat "Tenderly" was sold. The funds originated from Mr. Steinman, therefore, the proceeds of one "Tenderly's" sale were the property of Mr. Steinman.

For the Court to assert that the use of those funds in any way other than to pay the SBA is conversion, would be taking of Mr. Steinman's property without due process of law in violation of the Fifth Amendment of the Constitution.

The District Court as affirmed by the Appellate Court, erred in holding the Petitioner for conversion of property no longer subject to the collateral agreement.

It is respectfully submitted that the Court's decision would be a taking of property without due process of law as against Mr. Steinman, who was not a

party to the action, and the conversion finding must be reversed.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

DEAN R. PIC'L,
Attorney for Petitioner

MYDLAND & PIC'L
Of Counsel

APPENDIX A

Opinion of Court of Appeal

United States Court of Appeals

for the Ninth Circuit

The United States of America, Plaintiff and Respondent v. Dolphus Mickey Walker, Defendant and Appellant. No. 77-3325.

Filed January 29, 1979.

Appeal from the United States District Court for the Southern District of California. Hufstedler and Trask, Circuit Judges, and Fitzgerald, United States District Judge, District of Alaska, sitting by designation.

Walker was charged in a ten count indictment with converting and appropriating to his own use pledged collateral of the Small Business Administration.[1/] Although an earlier indictment had been returned against Walker on the same charges, possible procedural defects caused the government to represent the case to a subsequent Grand Jury. After arraignment on the charges, Walker filed pretrial

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1/ 15 U.S.C. 645(c):

Whoever, with intent to defraud, knowingly conceals, removes, disposes of, or converts to his own use or to that of another, any property mortgaged or pledged to, or held by, the Administration, shall be fined not more than $5,000 or imprisoned not more than five years, or both; but if the value of such property does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both.

motions against the superseding indictment contending it to have been obtained on hearsay evidence and that he was denied constitutional due process. The trial court denied these motions and Walker, having obtained the consent of the government, waived his right to a jury trial. Following an extensive trial, the judge found Walker guilty on four (4) counts. Having received sentence, he appeals, contending once again that the indictment should have been dismissed on his pretrial motions and additionally, that the evidence on which his convictions were obtained was on each count insufficient.

Appellate jurisdiction is conferred by 28 U.S.C. §1291.

THE GRAND JURY ISSUES:

The Appellant's challenge to the validity of the indictment is without substance. Walker appeared and testified at his request before the Grand Jury when the first indictment was considered. His testimony which was recorded amounted to more than one hundred pages of transcript. All of this testimony was read to the second Grand Jury at the time the case was re-presented. Moreover, Walker was again permitted to appear when the case was re-presented and testify for an additional twenty minutes. The Assistant United States Attorney then requested Walker to step outside the Grand Jury room and suggested to the Grand Jury that much of Walker's testimony was irrelevant since it had to do with matters wholly outside the

consideration of the Grand Jury. Nevertheless, the government's attorney informed the Grand Jurors that the matter was entirely within their discretion as to what the Grand Jury should choose to hear. The Grand Jurors voted unanimously to hear nothing further from Walker.

We hold Walker was not denied due process since he had no constitutional right to appear and testify before the Grand Jury. Moreover, the Grand Jury's decision to limit his testimony clearly was not error. United States v. Kaplan, 554 F.2d 958, 970 (9th Cir. 1977); United States v. Y. Hata & Co., Ltd., 535 F.2d 508, 512 (9th Cir. 1976).

When the matter was first presented to the Grand Jury the government's case agent read his summary of the case into the record; additional witnesses appeared and testified under oath and all testimony was recorded. When the case was re-presented the case agent once again appeared and read his summary, but the transcribed testimony of all other witnesses was read to the Grand Jury.

Walker's hearsay complaint arises from the reading of testimony of the witnesses rather than again recalling the witnesses when the case was re-presented. We hold this was not error. An Indictment in federal court may be based on hearsay testimony. United States v. Costello, 350 U.S. 359 (1956); United States v. Short, 493 F.2d 1170, 1173 (9th Cir. 1974), cert. denied 419 U.S. 1000 (1974).

THE INSUFFICIENCY APPEALS:

Appellant's claims that his conviction in each count was founded on insufficient evidence is likewise without merit.[2/] Nor is it necessary in this case to detail the extensive record in order to establish his culpability. A summary of the evidence suffices.

At the relevant time Walker was in the rental equipment business conducted from several locations. To enhance the business he applied for and obtained in December, 1973, a Small Business Administration loan amounting to $377,000. The loan was conditioned upon Walker pledging as collateral all his rental equipment and the improvements at the locations where he conducted business. The loan was processed through Guaranteed Government Securities and served by the San Gabriel Valley Bank. Immediately upon receiving disbursement of the funds, Walker embarked upon a course of conduct to totally deceive the SBA and to wholly appropriate the pledged collateral.

In January of 1974 an individual named Sid Dix responded to an advertisement for a business opportunity in the Los Angeles Times. Dix's inquiry put him in contact with Walker who immediately offered to sell A-Bee Rents at Whittier, California. Following some negotiations, a price of $50,000 was agreed upon with Dix providing a down payment of a

2/ 15 U.S.C. 645(c) has been the basis for few prosecutions; cf. generally the case at bar with U.S. v. Joyner, 539 F.2d 1162 (8th Cir. 1976).

diamond ring, a diamond wristwatch and $5,000 in cash. Interest on the unpaid balance was fixed at 4-1/2%. Although the transaction was for a sale of the business with its assets, it was cast in the terms of a five-year lease with option to purchase. The lease form was adopted at Walker's suggestion in order to obtain advantage of favorable tax consequences. At the time of the transaction, Dix was not informed of the SBA liens and failed to learn until March that the property was indeed encumbered. Dix took over control of the business February 1, 1974, and closed it down in June, 1974, after it failed to make a profit.

In July of 1974, Melvin Bodarke responded to a newspaper advertisement for a business opportunity involving West Covina Rents at Covina, California. On this occasion Walker was asking $200,000 for the business and its assets but Bodarke had only $30,000 to invest. After some negotiations, Walker agreed to accept a down payment of $30,000 with interest at the rate of 6-1/2% on the unpaid balance. Bodarke agreed to assume the remaining seven years of the real estate lease for the property where the business was conducted. Walker further represented to Bodarke that the real estate lease could be extended for ten additional years but unfortunately, the lessor refused to extend the lease or even to recognize the balance of the term. In this instance, Walker represented that the business and its assets were entirely free and clear of encumbrances although the entire property was

pledged to the SBA. Although the parties intended a sale of the business, here again, the transaction was, at Walker's request, put in the form of two leases, numbers 5093 and 5094.

In early autumn of 1974 Walker became interested the The Tenderly, a yacht owned by Lowell O'Connor. In October, Walker made O'Connor an offer to purchase the vessel. Walker proposed to assign his rights under Bodarke lease No. 5094 to O'Connor in exchange for The Tenderly. The offer was apparently unacceptable to O'Connor so in mid-October Walker contacted Thomas Roe, his associate. Roe then executed a series of leases, numbered 5099, 5101 and 5195, whereby a Roe corporation would lease with an option to purchase muct of the rental equipment of Azusa-Covina Rents, the only remaining location of Walker's business. Although the documents purported to make Roe the owner of Azusa-Covina, he never took possession of the property, except for a 1-1/2 hour period in which he locked out Walker to compel him to comply in an unrelated agreement.

Walker now approached O'Connor with a new offer for The Tenderly. He offered one of the Roe leases, No. 5195, and on October 26, 1974, Walker executed a bill of sale to O'Connor for the rental equipment covered by lease 5195. These arrangements appear to have met with O'Connor's approval and on November 1, 1974, he accepted Walker's offer on the boat. Walker's assignment and the outright sale of the

rental property served to wholly convert the pledged collateral covered by lease 5195, as the trial judge found. In addition, trial testimony established that Walker sold The Tenderly for $65,000 in 1975 and little, if any, of those funds were applied to the SBA loan.

Walker somehow continued to operate what remained of his rental business from the Azusa-Covina Rents location. On June 15, 1975, he loaded out a truckload of rental equipment worth $20,000 destined for Charlotte, North Carolina, where he held interests in several motels. In November the second and third truckloads were loaded bound for Walker's motels in North Carolina. Walker had one truckload insured for $20,000. On arrival in North Carolina the rental equipment was installed in Walker's motels. Walker promptly undertook to borrow $200,000 on each of the two motels from the First Pennsylvania Bank, pledging certain bonds and again including the equipment as collateral. To do so, Walker engaged in a bizarre and complicated series of transactions shifting title to the equipment among several corporations.

Although Walker attempted to use the rental equipment as partial collateral for the loans from First Pennsylvania Bank, he failed to inform First Pennsylvania's loan officer, Allen Duff, that the rental equipment had been pledged to the SBA. Walker also failed to inform Duff that the equipment was already covered by a "lease" from a Walker company to the motels. Failure to inform Duff of the equipment's

relationship with the motels is particularly significant since Walker asserted at trial that the truckloads of Azusa-Covina equipment that were transported to North Carolina were actually leased from Azusa-Covina to the North Carolina motels. Duff testified that Walker implied that the equipment was free of encumbrances. Ward, who managed Azusa-Covina Rents for Walker, testified that although he had shipped the equipment off to North Carolina on Walker's orders, he knew nothing of a lease of that equipment. A few checks were sent from North Carolina by Walker to Ward but they did not constitute lease payments as Walker claims; rather, Ward testified that Walker had directed that the checks be applied not to the SBA loan but to Walker's personal indebtedness.

In his defense at trial, Walker claimed to have obtained the consent of Edward Abtin, president of the San Gabriel Valley Bank, to dispose of the pledged collateral. In fact, he testified that it was at Abtin's suggestion that he advertised and sold A-Bee Rents to Dix. Abtin flatly contradicts Walker's testimony on this point. He recalls that on one occasion Walker indicated that he intended to dispose of A-Bee Rents but nothing more was said of this. Moreover, Abtin testified that at no time did Walker advise him that there had been a disposition of the equipment or the business at A-Bee Rents, West Covina Rents or Azusa-Covina Rents.[3/]

We need not relate in detail the remaining extensive evidence in the record establishing Walker's appropriation of the collateral with the requisite intent to defraud the SBA. The evidence established beyond doubt that he unlawfully converted the collateral in the manner charged in Counts I and VII. The evidence also established beyond any reasonable doubt that Walker caused pledged collateral to be removed from the rental business conducted in California to motels in North Carolina, with intent to defraud the SBA in the manner alleged in Counts IX and X. In short, the trial court carefully and thoroughly considered the evidence and arrived at the only reasonable conclusion permitted. We affirm the judgment on each of the counts of which Appellant Walker was convicted.

3/ On June 28, 1974, Walker was paid a field visit by SBA Investigator Bernard Hayward, head of the SBA's local portfolio office, who was inquiring about information received by the SBA that Walker might have been converting pledged collateral. Hayward testified that he warned Walker that under the original loan agreement, none of the collateral could be converted.

PROOF OF SERVICE

I, DEAN R. PIC'L, one of the attorneys for DOLPHUS MICKEY WALKER, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the th day of June, 1979, I served copies of the foregoing Petition for a Writ of Certiorari on several parties thereto, as follows:

1. On the United States Attorney, by mailing a copy, in a duly addressed envelope, with pre-paid postage, to: Andrea S. Ordin, United States Attorney, U. S. Attorneys Office, 12th Floor, U. S. Courthouse, 312 N. Spring Street, Los Angeles, CA 90012.

2. On the United States, by mailing a copy in a duly addressed envelope, with air mail postage prepaid, to: The Solicitor General, Department of Justice, Washington D.C. 20530.

3. On the United States Supreme Court, by mailing forty (40) copies in a duly addressed envelope, with pre-paid postage to: The United States Supreme Court, #1 First Street NE, Washington, D.C. 20543.

4. On the United States Court of Appeals, by mailing a copy in a duly addressed envelope, with pre-paid postage to U. S. Court of Appeals, Ninth Judicial District, P. O. Box 547, San Francisco, CA 94101.

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